IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT J. D. STRONG, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-PJC**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S REPLY IN
SUPPORT OF MOTION IN LIMINE REGARDING FORMER EMPLOYEES

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Reply in Support of its Motion in Limine Regarding Former Employees (Dkt. #2395) and in opposition to Plaintiffs' Response thereto (Dkt. #2474), requesting the Court to exclude the evidence, testimony, references, attorney statements, arguments as discussed in Peterson's opening brief and as further discussed herein. In further support of its Motion in Limine Regarding Former Employees, Peterson states and shows as follows:

I. Plaintiffs are prohibited from offering the deposition testimony of Peterson's former employees

Plaintiffs have failed to establish, as is their burden, the admissibility of the deposition testimony of Peterson's former employees Kerry Kinyon, Dan Henderson and Ron Mullikin. In response to Peterson's request to exclude the use of deposition testimony of its former employees, Plaintiffs contend that, notwithstanding the absence of an employment relationship between these individuals and Peterson at the time of their respective depositions, the hearsay testimony of these former employees is nonetheless admissible under Federal Rule of Civil Procedure 32(a)(4)(B), as an exception to the general hearsay rule, because these former employees are purportedly beyond the reach of this Court. *See* Dkt. #2474 at 5-8. In making this contention, Plaintiffs do not dispute—and, thus, concede—that they bear the burden to establish the admissibility of the subject testimony under the two-pronged analysis discussed in Peterson's opening brief: "First, the condition set forth in Rule 32(a) must exist before the deposition can be used at all. Second, when it is found that these conditions authorize the use of the deposition, it must be determined whether the matters contained in it are admissible under the rules of evidence." 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2142, at 159.

In their response, Plaintiffs contend that both prongs of this analysis are satisfied by Rule 32(a)(4)(B), which provides that deposition testimony may be used at trial if the witness is more than 100 miles from the place of trial. *See* Fed. R. Civ. P. 32(a)(4)(B). In sole support of their argument that the former employees fall within the scope of Rule 32(a)(4)(B), Plaintiffs attach a series of "MapQuest" maps purportedly depicting the distance and driving directions from each of the former employees' residences to the courthouse. *See* Dkt. ##2474-11, 2474-12, 2474-13. These depictions purport to establish that each of the three former employees at issue is from

100.5 miles to 113.92 miles from the courthouse as measured by the ordinary, usual and shortest route of travel between the point of origin and destination.

However, this purported evidence fails to establish that the former employees fall within the scope of Rule 32(a)(4)(B). In this regard, the extant authority indisputably establishes that the 100-mile requirement of Rule 32(a)(4)(B) is measured using straight line distance, i.e., as the crow flies, between the witness's residence, or place of employment, and the place of the trial, to wit:

> The 100-mile provision allowing for use of a deposition of an absent witness by any party for any purpose is a measurement of the radius from the witness' location to the place of trial measured "as the crow flies," that is, along a straight line on a map rather than along the ordinary, usual, and shortest route of public travel. For these purposes, the "place of trial" is the courthouse where the trial takes place and not the borders of the judicial district in which the courthouse sits because the latter would have the unintended effect of providing a variable standard of convenience, depending on the size of the district, the location of the trial, and the location of the witness.

JOHN KIMPFLEN ET AL., 10A FEDERAL PROCEDURE § 26:518;[1] *see SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214, 215-16 (D. Conn. 1977) (noting that the distances under Federal Rules of Civil Procedure 4, 32 and 45 are all determined using a "straight line measurement"); *accord Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 730 (10th Cir. 2006) (noting distances under Federal Rule of Civil Procedure 4 are measured "as the crow flies").

Plaintiffs "MapQuest evidence" is thus inapposite to their burden to establish the admissibility of the depositions of Peterson's former employees, since they unquestionably attempt to rely on an improper standard. Moreover, Plaintiffs fail to inform the Court that each of these former employees was deposed in Tulsa during the discovery phase of this litigation.

[1] The *Federal Procedure* treatise cites a number of authorities supporting the "straight line" measurement. *See Richmond v. Brooks*, 227 F.2d 490 (2d Cir. 1955); *Bellamy v. Molitor*, 108 F.R.D. 1 (W.D. Ky. 1983); *United States v. International Business Machines Corp.*, 90 F.R.D. 377 (S.D.N.Y. 1981); *SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214 (D. Conn. 1977).

Indeed, the deposition testimony of Mr. Kinyon and Mr. Henderson establish that their presence at these depositions was compelled by a Rule 45 subpoena. *See* Ex. 1, Kinyon Depo. at 7:3-9; Ex. 2, Henderson Depo. at 7:9-23.[2] Finally, using the straight line measurement from the courthouse to the former employees' residences demonstrates that all three witnesses are within the 100-mile range proscribed by Rule 32(a)(4)(B). *See* Ex. 3, 100-mile radius maps.

Thus, because Plaintiffs concede that the former employees do not fall under the language of Rule 32(a)(3), that the deposition testimony does not fall within Federal Rule of Evidence 801(d)(2)(D) (which Plaintiffs fail to substantively address in their response) and because they have not, and cannot, establish that the former employees are outside the 100-mile radius of Rule 32(a)(4)(B), they are prohibited from using these depositions at trial for any purpose.[3] Instead, Plaintiffs must—if they desire to offer the testimony of these former employees at trial—*once again* exercise subpoena power to compel their presence.

II. Mr. Mullikin's memoranda should be excluded from evidence at trial

Plaintiffs contend that the hearsay statements in Mr. Mullikin's memoranda are admissions of a party-opponent; however, Plaintiffs have failed to demonstrate the admissibility of the memoranda at issue under this particular exception to the hearsay rule. Instead, Plaintiffs make a number of unsupported statements about Mr. Mullikin's purported authority during his employment with Peterson, which are not supported by the record before the Court, and further

[2] Although the subpoena was not mentioned in his deposition, Mr. Mullikin was also deposed in the case in Tulsa presumably either under power of subpoena or upon a voluntary appearance. However, throughout discovery, Plaintiffs employed the unfortunate practice of sending their deposition Notices to Defendants without the associated subpoena. Consequently, Peterson is unable to provide Plaintiffs' subpoenas to the Court, conclusively demonstrating the disconnect between Plaintiffs' past practices and their contentions in response to Peterson's instant Motion.

[3] In the event that the Court determines generally that the deposition testimony of the former employees is admissible, Peterson has made additional, specific designations to the testimony designated by Plaintiffs, which it maintains will nonetheless render the testimony inadmissible.

suggest that Peterson has selectively presented its evidence demonstrating that the memoranda are inadmissible hearsay and otherwise unfairly prejudicial. As demonstrated in Peterson's opening brief, Plaintiffs' contentions lack merit.

Indeed, in support of its position, Peterson cited the sworn testimony of Mr. Mullikin wherein he stated that the opinions in his memoranda were his personal opinions; that he was not speaking on behalf of Peterson during his deposition; that he was not authorized to make statements binding on Peterson during the course of his employment; that he was not an officer or executive during his employment with Peterson; and that he was not intending to bind Peterson with any of his testimony. *See* Dkt. # 2395 at 5, and exhibits cited therein. Peterson likewise generously quoted from one of Mr. Mullikin's memoranda, which Plaintiffs frequently and selectively quote, wherein Mr. Mullikin explains that the opinions therein are personal opinions and further explains the rationale his personal opinions. *See id.* at 6. The aforementioned materials in Peterson's opening brief preemptively addressed Plaintiffs' expected contention, which is now expressed in their Response brief, that the memoranda satisfy the admissibility standard of Federal Rule of Evidence 801(d)(2)(D).

In response to Peterson's evidence demonstrating inadmissibility, Plaintiffs simply cite a portion of Rule 801(d)(2)(D), complete with added emphasis, and recite conclusory, self-serving statements that the memoranda are admissions of a party-opponent. Plaintiffs do not cite any extant authority supporting their proposition that Mr. Mullikin's personal opinions are binding on Peterson. Plaintiffs do not cite any record evidence to controvert the evidentiary materials cited by Peterson which are now before the Court, demonstrating that Mr. Mullikin was not any of the persons identified in the rule. Furthermore, Plaintiffs do not contest Mr. Mullikin's testimony that he did not ever have authority to bind Peterson with his statements. They do not

cite any evidence wherein any other witness establishes that Mr. Mullikin possessed the authority required under Rule 801(d)(2)(D). As such, Plaintiffs have failed to establish admissibility of the memoranda as admissions of a party-opponent. *See United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir. 2000) (explaining that party offering evidence under Rule 801(d)(2)(D) bears burden of establishing admissibility).[4]

In response to Peterson's contention that the memoranda, if admissible, should nonetheless be excluded from evidence under Federal Rule of Evidence 403, Plaintiffs again do not address the record before the Court, demonstrating (1) that any information or knowledge that Mr. Mullikin might have possessed was limited to issues regarding the Eucha-Spavinaw Watershed, which eventually became the subject matter of the unrelated *City of Tulsa* lawsuit, and (2) that he was unfamiliar with any issue in the IRW. *See* Dkt. #2395 at 9, and exhibits cited therein.

Plaintiffs nonetheless contend, without ever establishing any evidentiary foundation for their argument, that Mr. Mullikin's limited *personal* opinions regarding matters pertaining to the Eucha-Spavinaw Watershed have "universal" applicability "not limited to any particular watershed," thus, purportedly reaching the issues in this lawsuit. *See* Dkt. #2474 at 9. However, Plaintiffs fail to demonstrate any similarity between two different watersheds, having different characteristics (e.g., watershed size, poultry production statistics, etc.), and further fail to explain how Mr. Mullikin's admittedly uninformed opinion could have universal applicability on issues in this lawsuit. As such, Plaintiffs' contention amounts to unsupported hyperbole that should be disregarded.

[4] Of note, in arguing that the memoranda are admissible, Plaintiffs cite a Fourth Circuit case discussing attorney's judicial and evidentiary admissions. *See United States v. Blood*, 806 F.2d 1218, 1221 n.2 (4th Cir. 1986). This case is inapposite with regard to the purported admissions, which are not either the judicial or evidentiary admissions of an attorney. As such the remains that Plaintiffs have not established the admissibility of the subject memoranda.

Accordingly, Mr. Mullikin's memoranda, which contain his nonbinding, personal opinions on matters unrelated to the issues alleged in the IRW, should be excluded from evidence at trial.

III. Mr. Mullikin's *City of Tulsa* deposition testimony is inadmissible

Plaintiffs insist that Mr. Mullikin's 2002 deposition testimony from an unrelated litigation is admissible in this lawsuit under Federal Rule of Civil Procedure 32(a)(4)(B), again, contending that the aforementioned standard satisfies the two-pronged analysis of admissibility. *See* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2142, at 159. As demonstrated above, however, Plaintiffs have not and cannot establish that Mr. Mullikin is beyond the subpoena power of the Court, thereby failing to satisfy their burden on the admissibility of the 2002 deposition testimony. *See* Ex. 3, 100-mile radius maps. Moreover, had Plaintiffs satisfied the first prong of their burden, because Mr. Mullikin is not "unavailable" under Federal Rule of Evidence 804, Plaintiffs cannot establish that the 2002 deposition transcript satisfies the second prong requiring an exception to the general hearsay rule.

Likewise, they do not contend that the 2002 deposition falls within any of the other exceptions to general hearsay rule. Finally, Plaintiffs' attempt to distinguish Mr. Mullikin's 2002 testimony with the issues in this case amount to conclusory contentions that are no more effective than those presented to the Court when they sought the wholesale production of the *City of Tulsa* discovery materials. *See* Dkt. #932 at 3 ("Plaintiffs provide no explanation for seeking depositions and documents in an action which dealt with a different watershed and different water bodies"). Thus, the threshold inadmissibility of Mr. Mullikin's 2002 deposition is without doubt and should be excluded from trial.

IV. The technical and scientific opinions of Mr. Mullikin are inadmissible[5]

Plaintiffs have failed to fully address the issues raised with regard to Mr. Mullikin's expert opinions offered in his depositions and his memoranda, especially with respect to the former category of statements. Plaintiffs nominally contend that Mr. Mullikin's technical and scientific opinions given during his deposition(s) and memoranda are admissible.[6] They argue that Mr. Mullikin's statements are admissions of a party-opponent and that Mr. his testimony is admissible as a lay opinion. Admissibility in both cases fail.

With regard to Plaintiffs' first argument, Mr. Mullikin's deposition testimony, all of which was provided after Mr. Mullikin terminated his employment with Peterson, does not fall within any of the categories in Federal Rule of Evidence 801(d)(2); and, apart from their conclusory contentions that the testimony is an admission of a party-opponent, Plaintiffs fail to explain how any of Mr. Mullikin's post-employment testimony meets any of the applicable standards within the rule. Indeed, Plaintiffs do not discuss the deposition testimony at all, effectively conceding that the testimony is not admissible as an admission of party-opponent. Moreover, Plaintiffs do not direct the Court to any authority supporting their contention that a witness's personal opinion can be construed as an admission of fact under Rule 801(d)(2). As such, the Court should similarly disregard Plaintiffs' unsupported contention that a non-party to this lawsuit is capable of uttering a personal opinion during the course of a deposition binding as an admission on the part of Peterson.

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[5] If the Court finds that Mr. Mullikin's deposition testimony is inadmissible and if Plaintiffs subpoena Mr. Mullikin for trial, Mr. Mullikin's technical and scientific opinions are nonetheless inadmissible for the reasons stated in Peterson's opening brief and in this Part IV.

[6] Plaintiffs' arguments with regard to Mr. Mullikin's memoranda are also addressed in Part III, *supra*, which is incorporated herein by reference.

With regard to Plaintiffs' second argument, Plaintiff have failed to address the issues that Peterson raised in its opening brief with regard to Mr. Mullikin's lack of qualifications to offer expert opinions on a variety of topics in his deposition. Indeed, in the opening brief, Peterson cited numerous examples of Mr. Mullikin's inadmissible testimony where he offered, at Plaintiffs' behest, expert opinions on matters of for Plaintiffs' expert have also offered opinions. *See* Dkt. #2395 at 10-11, 14. The examples include Mr. Mullikin's expert opinions on matters of agronomy, industry practices and technical matters contained in the *Poultry Water Quality Handbook*. *See id.* Plaintiffs' contention in opposition to these examples is limited to a single example where Mr. Mullikin testified about one of the memoranda addressed in Part II, *supra*. While Peterson maintains that the testimony relied upon by Plaintiffs is inadmissible for all the reasons discussed before, Plaintiffs' sole example does not begin to address the inadmissibility of expert opinion testimony offered by Mr. Mullikin during his deposition or in his memoranda. Mr. Mullikin's expert opinions are based on scientific, technical or other specialized knowledge, which precludes their admissibility under Federal Rule of Evidence 701. Plaintiffs have not demonstrated otherwise. As such, Plaintiffs have not established the admissibility of the testimony.

V. Conclusion

For the reasons stated herein, Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the foregoing categories of evidentiary materials, including any and all testimony, references, attorney statements or arguments.

Respectfully submitted,

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I certify that on the 1st day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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